IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 422

WILLIAM LINK,

Petitioner,

vs.

WABASH RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
For the Seventh Circuit

(Opinion below is Appended Hereto)

JAY E. DARLINGTON
306 Hammond Building
Hammond, Indiana
Attorney for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX TO PETITION

	PAGE
Opinions below	2
Grounds for invoking this Court's jurisdiction	2
Questions presented for review	2
Constitutional provisions, rules, etc. involved	3
Concise statement of the case	8
Argument	13
I. Confusion and injustice caused by the asserted "inherent power" in District Courts to dismiss cases on grounds and by procedures outside the Rules	13
II. Injustice of the District Judge taking the initiative and dismissing Petitioner's case *on the Court's motion* when the defendant's counsel was not in a position so to do	17

INDEX TO APPENDIX

Court of Appeal's opinion (majority)	1a
Court of Appeal's opinion (dissenting)	8a
Court of Appeal's judgment	12a
Court of Appeal's order denying rehearing	13a

Table of Cases.

Darlington v. Studebaker-Packard Corp. (7 Cir., 1959) 261 F.2d 903	21
Dalrymple v. Pittsburgh Consol. Coal Co. (D.C. W.D. Pa., 1959) 24 F.R.D. 260	22
Link v. Wabash R. Co. (prior appeal) (7 Cir., 1956) 237 F.2d 1	8

PAGE

Syracuse Broadcasting Corp. v. Newhouse (2 Cir., 1958) 271 F.2d 910, 914 ..... 19, 20

Societe International etc. v. Rogers (1958) 78 S. Ct. 1087, 1094 20

Wisdom v. Western Texas Co. (D.C. N.D. Ala. 1939) 27 F.Supp. 992 21

CONSTITUTION, STATUTES, RULES

Local Rule 6 (motions to dismiss) 4, 18

Local Rule 12 (pre-trial) 4

Local Rule 10—formerly No. 11 (dismissal) 7, 13, 21

F.R.C.P. Rule 16 (pre-trial) 4

F.R.C.P. Rule 41(b) (dismissal) 6, 13, 15, 17

F.R.C.P. Rule 83 (Dist. Ct's rule-making power) 7, 13

Supreme Court Rule 19, par. 1(b) 3

U.S. Constitution, Fifth Amend. 3

TEXTS.

16A C.J.S., Constitutional Law, sec. 567, p. 541 20

16A C.J.S., Constitutional Law, sec. 569, p. 559 21

16A C.J.S., Constitutional Law, sec. 569(3), p. 570 21

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To The Honorable, The Chief Juistice and Associate Justices of The Supreme Court of the United States:

The above named Petitioner respectfully petitions this Court to issue its writ of certiorari to said Court of Appeals, to review that Court's judgment affirming a final judgment of the United States District Court for the Northern District of Indiana which dismissed this petitioner-plaintiff's civil action for damages for personal injuries (without trial).

Opinions Below.

The opinion of the Court of Appeals, set forth in the Appendix of this petition at pages 1(a)-10(a), is reported in:

Link v. *Wabash Railroad Co.* (C.A. 7, 1961) 291 F. 2d, 542 (Judge Schnackenberg dissenting at p. 547).

No opinion was filed by the District Court.

Grounds for Invoking This Court's Jurisdiction.

This Court's general jurisdiction to review final judgments of the Courts of Appeals in civil cases is invoked.

The Court of Appeals rendered its opinion and judgment of affirmance on May 26, 1961, following which a timely petition for rehearing by this petitioner-plaintiff was entertained and denied on the merits on June 21, 1961. (Appendix, 12(a) and 13(a). This Petition is being filed on the ninetieth day thereafter, September 19, 1961.

This Court's jurisdiction is based upon 28 U.S.C. 1254(1).

Questions Presented for Review.

(1) The *extent* of a District Court's asserted "inherent power" in a civil case, *beyond the Rules of Civil Procedure, and beyond the District Court's local rules.*

Specifically applying the above question: When this petitioner-plaintiff's personal injury case was at issue, but *not set for trial,* and the Court had called for counsel to come in for *a pre-trial conference,* by means of a mimeo-

graphed letter, and plaintiff's counsel failed to attend this noticed hearing,—did the District Court have the "inherent power" to enter final judgment dismissing the action with prejudice on account of this failure, *in the absence of any Rule of Civil Procedure or any local rule of the District Court authorizing such dismissal under such circumstances?*

(2) Secondary to No. 1, — if such "inherent power" did exist, did the District Court abuse the power in this case, in view of the fact that before the hour for the pre-trial hearing, plaintiff's counsel conveyed word to the Judge and to opposing counsel of his inability to attend the hearing that particular day, stating it was due to his necessary absence that day 160 miles away in Indianapolis working on an urgent case in the Supreme Court of Indiana, but that he would be ready to attend the conference the *next day* or any day thereafter?

Constitutional Provisions, Rules, etc. Involved.

No statute, federal or state, is involved in the present Petition.

The only constitutional provision which might be involved is that part of the *Fifth Amendment* to the Constitution of the United States, reading:

> "No person shall • • • be deprived of life, liberty, or *property,* without *due process* of law; • • •" (Our emphasis)

Petitioner believes that the alleged arbitrary assumption of power by the District Court in this case (approved by a 2 to 1 majority of the Court of Appeals) is sufficiently

serious from a standpoint of orderly and responsible administration of justice in the District Courts, so that it would be in the public interest for this Court to treat this Petition, and any further review which it might give, on the basis of a denial of Petitioner's *constitutional rights,* rather than on a basis of mere procedural error. Hence, we think the *basis* for review is discretionary with this Court.

More directly involved, for the same reasons, is *this Court's Rule 19, par. 1 (b)* indicating the character of reasons which will be considered" (for granting a writ of certiorari)—

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same manner; • • • or has so far departed from the accepted and usual course of judicial proceedings, *or so far sanctioned such a departure by a lower court,* as to call for an exercise of *this court's power of supervision.*" (Our emphasis)

The only Rules directly involved in this petition are the following **relating to pre-trial conferences.** First, is the **District Court's Local Rule 12** which, without adding anything to the Rules of Civil Procedure on that subject, provides:

> "*Pre-Trial Conferences.*
>
> "The court *may* hold pre-trial *conferences* in any civil case upon *notice* given to counsel for all parties." (Our emphasis). (Effective March 1, 1960).

The above is simply a local application of **Rule 16 of Civil Procedure,** which reads

> "*Rule 16. Pre-Trial Procedure; Formulating Issues.*
>
> "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a *conference* to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the *action taken at the conference,* the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions." (Our emphasis)

The District Judge *made* the dismissal, and the majority opinion of the Court of Appeals *upheld* it, on the doctrine of the District Court's supposed "*inherent power*" to make such dismissals *outside the Rules* of Civil Procedure and outside its own Local Rule on the *subject* of dismissals. (See opinion at 291 F. 2d 542, 545, Appendix hereof, p. 5a, and Argument hereof, at pp. 13 *infra.*)

Nevertheless, *the Rule of Civil Procedure governing involuntary dismissals is pertinent to our Petition* because we contend that it *defined* and made *uniform* the *powers*

and *procedure* of District Courts on the *subject* of dismissals,—not to be overridden by local rules, still less to be overridden by some asserted and *undefined* "*inherent power*" of a District Court to dismiss even outside of the local rule.

Rule 41(b) of Civil Procedure provides:

> "(b) Involuntary Dismissal: Effect Thereof. For *failure of the plaintiff to prosecute* or to comply with these rules or any order of court, *a defendant may move* for dismissal of an action or any claim against him * * *" (Our emphasis).

In conjunction with the language of *Rule 41 (b)*, last quoted, *requiring a motion by the defendant* as a *basis* for the Court to order a dismissal, the following **Local Rule 6** of this District Court will be pertinent, because it spells out strict and detailed provisions *requiring notice* and other acts by the moving party as a *prerequisite* to *motions to dismiss:*

> "(a) The time of *hearing motions* shall be *fixed* by the court. Dates of hearing shall not be specified in the notice of the motion unless prior authorization be obtained from the judge or his secretary. When time is not specified in the notice, request for hearings may be made by either counsel after the motion has been filed.
>
> (b) Motions *to dismiss,* for summary judgment, and for judgment on the pleadings *shall* be accompanied by a *brief.* An adverse party *shall have 15 days* after service of the movant's brief to *file an answer brief.* Failure to file briefs within the time prescribed shall subject such motions to summary ruling and without oral argument." (Our emphasis).
>
> District Court Rule 6 (a) (b)
> (Effective March 1, 1960).

Rule 83 of Civil Procedure entitled "Rules by District Courts," which is the *only* rule devoted to that *subject*, reads:

> "Each district court by action of a majority of the judges thereof may from time to time *make* and amend *rules* governing *its practice not inconsistent* with these rules. *Copies of rules* and amendments so made by any district court shall upon their promulgation be *furnished to the Supreme Court* of the United States. In all cases *not provided for by rule*, the district courts may regulate their practice in any manner *not inconsistent* with these rules." (Our emphasis).

In the Commentaries under the above Rule 83 is the following:

> "'The intention of the Committee was to provide a simple, *unified* system which would be governed by a *single*, brief *body* of rules. * * *. Daniel K. Hopkinson, *23 Marq. L. Rev. 159.*" (Our emphasis).

Present Local Rule 10 of this District Court, effective March 1, 1960 (formerly its **Local Rule 11** effective September 1, 1955), which is headed "Dismissal of Civil Actions Because of Lack of Prosecution" and which is the *only* Local Rule of this District Court on the *subject* of dismissal, reads, without change from the 1955 edition:

> "Civil cases in which *no action* has been taken for a period of *one year* may be dismissed *for want of prosecution* with judgment for costs *after thirty days notice* given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise." (Our emphasis).

Neither the District Court nor the Court of Appeals' majority opinion sought to sustain the dismissal on the above **Local Rule 10**, nor could they, because the record

shows that during the *year* preceding the dismissal of October 12, 1960, the *defendant* had filed additional interrogatories to the plaintiff on March 11, 1960 and the plaintiff filed answers thereto on April 15, 1960, *so both sides have been active within the year.* (Record Appendix pp. 6(a), 8(a)).

Petitioner regards the above **Local Rule 10** as pertinent here under the doctrine that "the expression of one excludes the other".

Concise Statement of the Case.

The facts material to consideration of the questions here presented are very short and simple and are largely indicated already under the preceding headings "Questions Presented," and "Constitutional Provisions, Rules, etc. Involved".

Jurisdiction vested in the District Court under diversity of citizenship on the petitioner-plaintiff's complaint alleging severe and permanent personal injuries and praying damages exceeding the jurisdictional amount.

The Record Appendix contains a complete chronological list of the docket entries in the case in the District Court, plus all orders and other papers in the case since July 2, 1959, including the transcript of the *ex parte* pre-trial hearing of October 12, 1960 at which the Court dismissed the case. It shows:

Complaint was filed August 4, 1954. Defendant filed a motion for judgment on the pleadings on April 30, 1955, which motion the Court sustained November 30, 1955. Plaintiff appealed and obtained reversal with directions to vacate the judgment and proceed with the case. *Link* v. *Wabash Railroad Co.* (7 Cir. 1956) 237 F. 2d 1, certiorari

denied 352 U.S. 1003. Mandate went down to the District Court on March 13, 1957.

Without listing all the succeeding proceedings, they included an order of June 4, 1959 setting the case for trial on July 22, 1959. Then on July 2, 1959, an order was entered reciting "*At defendant's request*, to which request plaintiff agrees, trial of this case set for July 2, 1959 is *continued until further assignment* by the court. (Record Appendix p. 6(a)).

There never was any trial setting made in the case *at any time thereafter.* (Record Appendix p. 4(a)).

The only proceedings from that indefinite trial continuance on July 2, 1959 until the pre-trial conference and dismissal of October 12, 1960, consisted of the *defendant* filing additional interrogatories for plaintiff to answer on March 11, 1960, to which, after a granted extension, the plaintiff filed answers on April 15, 1960. (Record Appendix 4(a), 6(a), 8(a)).

The facts concerning the pre-trial conference of October 12, 1960, are recited sufficiently for present purposes in the Court of Appeals' majority opinion, 291 F. 2d at pp. 544-545; Appendix hereof, pp. 4a-5a. It recites that notice had been mailed to counsel on both sides on September 29, scheduling a pre-trial conference in the case for October 12, 1960 at 1 P.M., *pursuant to Local Rule 12* (above quoted at p. 4 hereof). Notice was received by counsel on both sides. On the *forenoon* of Wednesday, October 12, 1960, plaintiff's counsel called by telephone from Indianapolis (160 miles distant from the court in Hammond, Indiana) and asked the Judge's secretary for permission to talk with the Judge, but the latter was on the bench, so then plaintiff's counsel *asked her to convey to the Judge the following message* (which she did prior

to the hour of hearing), namely, that he was in Indianapolis—and that he was *busy preparing papers to file with the Indiana Supreme Court,* though he was not actually engaged in argument, "that he *couldn't* be here by 1 o'clock (Wednesday, October 12), but he *would* be here either Thursday afternoon (*one day later*) or any time Friday (two days later) if it could be re-set." She told plaintiff's counsel she would convey this message to the Court and opposing counsel which she apparently promptly did to both of them before the scheduled hour of 1 P.M. Defendant's counsel told the Court at the hearing that plaintiff's counsel had called him on the preceding morning (October 11) from Indianapolis and had then stated *he expected to be in court for the pre-trial.* He said the Judge's secretary conveyed to him the above message from plaintiff's counsel on the forenoon of October 12. The opinion next goes on to say:

> "The trial judge then reviewed the history of this ltigation and pointed out that plaintiff's counsel had notice of the hearing, did not appear for the hearing and had failed to indicate any 'reasonable reason' for not appearing. In view of *all the circumstances surrounding counsel's action in the case,* the *trial court concluded that it* should *'exercise its inherent power to dismiss* this action' upon 'failure of plaintiff's counsel to appear *at a pretrial* • • • counsel having failed to give any good and sufficient reason for not appearing *at the said pretrial'.* The case *was then dismissed."* (Our emphasis).
>
> 291 F. 2d 542, 545, first column.
> Appendix hereof, p. 5a.

It is clearly apparent from the above part of the opinion which directly quotes the District Judge, that the latter *predicated the dismissal solely and squarely upon his asserted "inherent power"* to dismiss this action, and also

that this power was *exercised solely because of the absence of plaintiff's counsel from the pre-trial hearing.* (We pass, for the moment, the secondary and probably not controlling question of whether the above-quoted charges by the Judge that plaintiff's counsel had failed to give any good and sufficient reason for not appearing, shows an arbitrary harshness in exercising his alleged "inherent power," in view of the previously recited facts).

Again, on the same page, the opinion in effect reiterates the above-quoted "inherent power" doctrine. The plaintiff-appellant had argued to the Court of Appeals that the *dismissal could not stand* because there had been *no motion by the defendant* for dismissal as required by *Rule 41(b)* of Civil Procedure, that the District Court had made the dismissal on its own motion (as is indicated in the last quotation, *supra*), and that the *dismissal could not stand on Local Rule 11* because both parties had been active in the case during the preceding year. (These rules are quoted at pp. 6-7 hereof). In response to these contentions, the majority opinion said:

> "Plaintiff argues that there was *no motion by defendant* for dismissal. *Since the trial court did not base its dismissal on Local Rule 11, supra, or on Rule 41(b),* Federal Rules of Civil Procedure, for want of prosecution, no such motion was required. It is quite clear to us that district courts have ample authority to '*regulate* their practice in any manner *not inconsistent* with' the Federal Rules of Civil Procedure, as provided in *Rule 83, supra. This case comes within the purview of that rule.*" (Our emphasis).

Final judgment was entered the same day, at the close of the pre-trial hearing dismissing plaintiff's case with prejudice (without a saving clause). It reads:

Order Book Entry: October 12, 1960

Pursuant to the inherent powers of the Court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, *the cause is now dismissed.*

Luther M. Swygert:
Judge

Record Appendix, p. 9a.

From this judgment this petitioner-plaintiff took his appeal by notice of appeal filed November 10, 1960, and by other procedures,—the validity of the appeal not being questioned.

Record Appendix, p. 9a.

ARGUMENT.

I.

Confronted by a simple situation where *no ground for involuntary dismissal* was authorized in *Rule 41(b)* of Civil Procedure or in the *Local Rule 10 (former No. 11)* on dismissal (pp. 6-7 *supra*), these courts below have *created their own undefined grounds* for dismissal, *outside the letter and spirit of the Rules of Civil Procedure* established by this Court. This, they have done by putting forth a confused doctrine which:

(a) Announces the doctrine that District Courts have "*inherent power*" to dismiss cases, *without* any Rule of Civil Procedure or any Local Rule *authorizing* dismissal in the given situation. (291 F.2d at p. 545, first column; Appendix hereof, pp. 5a-6a).

(b) They predicate this power upon *Rule 83* of Civil Procedures which authorizes "each district court" to make and amend *rules* governing its practice *not inconsistent* with these rules." Rule 83 requires that "*Copies of rules* and amendments so made by any district court *shall* upon their promulgation *be furnished to the Supreme Court of the United States*." But admittedly this District Court *had no local rule* authorizing this dismissal. The local rule on that subject *did not* authorize such a dismissal. (p. 7 *supra*). The *majority opinion frankly admits the lack of any authorizing rule* and states that the District Court did not base this dismissal on either the local rule or Rule 41(b) of Civil Procedure. (291 F.2d at p. 545, point3; Appendix hereof, p. 6a).

(c) Then they proceed to *distort and enlarge* the next and final sentence of *Rule 83*, which reads:

> "In all cases not provided for by rule, the district courts may *regulate* their practice in any manner *not inconsistent* with these rules." (291 F.2d at p. 545, second column, point 3; Appendix hereof, p. 6a).

The "inconsistency" and havoc which would be created in the Rules of Civil Procedure across the nation by this distortion permitting each district court to render final judgments of dismissal (or other equally important matters) under the guise of "regulating their local practice", *outside the Rules of Civil Procedure*, and *without* even a promulgated *local rule* to authorize it or to guide attorneys or safeguard litigants, *all unknown to the Supreme Court* until some victim of the unpublished "practice" comes up on certiorari,—is obvious.

(d) Next, the majority opinion reverts to the "inherent power" doctrine,—but this time it is enlarged to justify dismissals as "sanctions," imposed under no defined standards to enforce vague compliances (including necessarily an attorney's inability to get to a pre-trial conference on schedule as in this case. (291 F.2d 545, par. 4; Appendix hereof, p. 6a).

If this Court permits that majority opinion to stand, then the Rules of Civil Procedure, which represent great labor not only by this Court but by able and dedicated committees, will become a mockery, relied upon by lawyers and litigants, but actually subject to be nullified by any District Court at any time in any case, under this newly announced "inherent power" of each District Court to

"regulate its practice" (they ignore the plain and *necessary* purpose and intent of the words "not inconsistent with", though they do lip service to them by quoting them.)

"Regulate *what practice?*" The plain purpose of this language was to give the District Courts enough authority to handle minor local practice problems, which necessarily differ in different courts and parts of the country.

But not to cast aside the nationwide *Rule 41(b)* on the *major* subject of "Involuntary Dismissals" and the final judgments resulting therefrom, — often cases of large amounts and national importance.

If *this* Rule of Civil Procedure is subject to be nullified or evaded or modified at the will or whim of any District Court under the guise of "regulating its procedure", *which* of the Rules of Civil Procedure are *not* subject to be by-passed?

And if a District Court has a Local Rule covering the subject of *dismissal*, as this one had, what good is it if the Court can by-pass it and make up a different rule or "practice" on the spur of the moment?

This majority opinion in effect makes every District Court a self-governed barony, so far as procedure is concerned, only nominally under the Supreme Court's Rules of Civil Procedure.

Under the old Conformity Act, we at least had the protection of the settled state practice in the federal courts.

The resulting injustice, evils, confusion and depreciation of the Supreme Court's function, at least in procedural matters, are apparent without further elaboration.

Petitioner does not argue—nobody argues—against giving District Courts and all courts the "sanctions" neces-

sary to maintain respect and orderly procedure. The Rules of Civil Procedure spell out many sanctions appropriate to various situations. But nowhere in those Rules is there authorized or indicated such an abortive and arbitrary dismissal as this one, under the guise of a "sanction" for no reason except that plaintiff's counsel "had failed to indicate any reasonable reason" for not arriving. How could he speak for himself and give "reasonable reasons" in his absence?

There is no showing in the Record Appendix of proceedings in the District Court or in the majority opinion that the case was in any way delayed by counsel's *one day* delay in arrival. *The opinion admits that the case had previously been delayed during a two year period 1955-1957 by the District Court's error in granting judgment on the pleadings upon defendant's erroneous motion therefor* (291 F.2d at p. 543, second column; Appendix hereof, p. 2a). The defendant fought the plaintiff to the Supreme Court on that issue on its unsuccessful petition for certiorari. *That error of the District Court cost the plaintiff much money and his counsel much labor.* Yet the District Court, at the abortive, *ex parte* pre-trial hearing expressed some indignation and concern over the alleged inconvenience to the Court and defense counsel on account of plaintiff's counsel's delaying *one day*. (Rec. Append. 15a-16a). And both the Court and defense counsel joined in complaining about the *age* of the case, though their own errors had put much of the age on it. (Rec. Append. 11a, 14a).

While we do not think that alleged *fault* of plaintiff's counsel for being absent, is material to the main issue above, discussed, the admitted facts stated in the majority opinion show that no reasonable fault existed (291 F.2d at pp. 544-545; Appendix heerof, pp. 4a-5a).

The latter part of the majority opinion erroneously implies that at oral argument plaintiff's counsel "conceded" fault in not getting to the conference. (291 F.2d at p. 546, second column; Appendix hereof, p 8a). The Appellant's Brief in the Court of Appeals, which has come up here bound with the Record Appendix under that Court's practice shows that it contained a vigorous defense of counsel's *lack* of fault under a section headed "Adequate Showing of Inability of Plaintiff's Counsel to be Present" (p. 11 of brief). In oral argument we adhered to the same position. Why should the victim apologize? What the opinion apparently refers to is our answer to a *hypothetical* question from the bench,—*if* a plaintiff's attorney were at fault in not attending a hearing, what sanction should be imposed? Our answer was that *if* such a thing occurred, the court would have ample power to discipline the attorney as an *officer* of the court, but not to *dismiss* his client's case. Our position is the same now.

II.

This "inherent power" doctrine, wherein the District Court took the initiative and in effect dismissed the case *on its own motion*, as a supposed "sanction" imposed for the absence of plaintiff's counsel, had an unusual and probably unprecedented result:

Under all the existing dismissal rules, *the defendant's counsel could not have obtained this dismissal judgment*, at this pre-trial hearing, *without motion* or notice of motion for such dismissal.

Rule 41(b) of Civil procedure requires that for any failure of the plaintiff to prosecute or to comply with the Rules of Civil Procedure or any order, "*a defendant may move* for dismissal".

Local Rule 6(b) required generally and without qualification *that Motions to dismiss* must be accompanied by a supporting brief, with 15 days for an answer brief. (See quotation, p. 6 *supra*.)

The record shows that at no time, during or after the pre-trial hearing, did defense counsel file or serve a written motion to dismiss, *or even go so far as to make an actual oral motion to dismiss during the hearing.* The transcript of the hearing shows that the Judge took the initiative throughout the hearing. He merely asked defense counsel for his "thinking", and counsel (Mr. Bodle) "suggested" to the Judge that the latter had this "inherent power" to dismiss, but *refrained* from making any actual motion:

The Judge had called in his secretary to relate on the record her telephone call from plaintiff's counsel that forenoon, which she obviously had already reported the Judge before the hearing (see pp. 9-10 above, also Rec. Append. 12a-13a). The following then took place:

> "The Court: That is all, as you recall it, that was said?
>
> Miss Griffith: Yes sir.
>
> The Court: Thank you. Under the circumstances, what is *your thinking*, Mr. Bodle?
>
> Mr. Bodle: I would certainly *suggest* to the Court that *it has inherent authority to dismiss cases,* not only under its own local rule concerning prosecution, but it has *inherent power, without any specific rule,* by virtue of Federal Rule 83, and *the inherent power of the Court to dismiss* where the Court *thinks* it necessary under the particular *situations not provided for by any specific rule.* (Our emphasis).
>
> Rec. Append. 13a.

Then, after some further discussion, mainly consisting of the Judge and defense counsel joining in criticizing plintiff's counsel for not getting there and blaming him of the "age" of the case, the Judge *on his own motion,* dismissed the case and directed the Clerk to enter the dismissal judgment. (Rec. Append. 13-16a).

Thus it is clear as a matter of law that under all available dismissal rules (pp. 6-7 *supra*), *the defendant could not have moved for, and in fact did not move for a dismissal,* but *the Judge, taking the initiative throughout the hearing, ordered a dismissal in the absence of plaintiff's counsel,* without the latter *knowing* that any dismissal was impending or contemplated, and without so much as giving him an *opportunity to get back the next day and be heard* in opposition.

This is one illustration of the evils, injustices and abortive procedure which flow from this "inherent power" doctrine, derived from distorting the scope and purpose of Rule 83 of Civil Procedure.

The Courts have held that pre-trial *Rule 16* "confers *no special power of dismissal* not otherwise contained in the rules:"

> "In dismissing the action the district court *relied* upon *Rules 16 and 11(b)*, 28 U.S.C.A. Rule 16 appears to have been invoked on the theory that *dismissal at the pre-trial stage is proper where it* clearly appears that plaintiff *will be unable to* prove the allegations of its complaint. We hold, however, that *Rule 16 confers no special power of dismissal not otherwise contained in the rules.* • • •" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse,* (2 Cir. 1958) 271 F. 2d 910, 914.

Even as to recalcitrant parties who were evading *orders* for discovery and the like (which did not occur in the present case), dismissal with prejudice was applied with great caution:

> "• • • Dismissal with prejudice is a *drastic sanction* to be applied only in *extreme* situations. *Gill* v. *Stolow*, 2 Cir., 1957, 240 F. 2d 669; *Producers Releasing Corp. de Cuba* v. *PRC Pictures*, 2 Cir., 1949, 176 F. 2d 93, and here the preclusion order seems an ample penalty for any lack of cooperation on plaintiff's part.
>
> We hold that *dismissal was improper.*" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse*, (2 Cir. 1958) 271 F. 2d 910, 914.

> "• • • These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to *dismiss* an action *without affording a party the opportunity* for a hearing on the merits of his cause. • • •" (Our emphasis).
>
> *Societe International etc.* v. *Rogers* (1958) 78 S. Ct. 1087, 1094.

Viewing this peculiar, unnatural, abortive hearing and its unnecessary and unjust results, it seems to fall far short of the basic requirements of "due process of law" under the *Fifth Amendment*. This is why we said at page 4 *supra*, that we think it is optional with this Court to grant relief under the Fifth Amendment, along with a correction of the erroneous procedural concepts below:

> "In judicial proceedings, due process of law means law in *its regular course* of administration through courts of justice, in accordance with the fundamental principles of free government. • • • (our emphasis).
>
> 16A C.J.S., Constituted Law, Sec. 567, p. 541.

"The constitutional guaranty of due process of law is intended to protect the individual *against arbitrary exercise* of governmental power and secure to all equal protection of the law. It is a matter of substance, not of form, and does not guarantee against judicial error." (Our Emphasis)

16A C.J.S., Constitutional Law, sec 569, p. 559.

"Exericse of power. The due process clauses require that a power conferred by law be exercised *judiciously* with an honest intent to fulfill the purpose of the law, *and it is a part of the judicial function to see that the requirement is met.*" (Our emphasis).

16A C.J.S., Constitutional Law, sec. 569(3), p. 570.

None of the cases cited in the majority opinion are comparable with what occurred in this case, and none of them sustain the abortive procedure or the unjust result in this case.

Darlington v. *Studebaker-Packard Corp.*, (7 Cir. 1959) 261 F.2d 903, cited in the opinion at the bottom of p. 545, was where a case was dismissed under this same District Court's *Local Rule 11* (now renumbered as Rule 10) *after 30 days notice.* This Rule is quoted at p. 7 *supra. It is the same Local Rule 11 which the majority opinion says two paragraphs earlier is not involved in our case.* The short excerpt quoted from it is dictum. The point decided was that this Local Rule 11 was not inconsistent with the Rules of Civil Procedure, and hence was a valid local rule.

Wisdom v. *Texas Co.*, (D.C., N.D., Ala. 1939) 27 F. Supp. 992, 993, cited in the opinion at p. 546, involved a pre-

trial hearing, but the *defendant moved under Rule 41(b)* for dismissal for want of prosecution, which, as above shown, *the defendant did not do in this case.* Further the majority opinion says on the preceding page, point 3, that this *Rule 41(b) is not involved in our case.*

Dalrymple v. *Pittsburgh Consolidated Coal Co.*, (D.C. W.D. Pa. 1959) 24 F.R.D. 260, cited in the opinion at p. 546, is shown by the quoted excerpt to have involved "flagrant disobedience" of the court's rules, whereas there admittedly was *no rule disobeyed in our case.*

Likewise, it appears from the majority opinion's own descriptions and excerpts from its remaining cases cited at page 546, that none are in point with our facts and all seem to have involved *disobedience of orders* for which various sanctions were imposed.

The dissenting opinion of Judge Schnackenberg, (291 F.2d 547; Appendix hereof, p. 8a) is an able and sufficient discussion of the facts and law, sufficient in itself to demonstrate grossly wrong procedure and needless injustice inflicted upon tthe plaintiff. We have not discussed it in detail in this Petition, because it speaks for itself. We have endeavored to present additional points of law and fact.

Wherefore, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgments below may be reversed, and for all other proper relief.

JAY E. DARLINGTON,
Attorney for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

SEPTEMBER TERM, 1960—APRIL SESSION, 1961.

No. 13221
WILLIAM LINK,
Plaintiff-Appellant,
v.
WABASH RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

May 26, 1961.

Before HASTINGS, *Chief Judge,* SCHNACKENBERG and KNOCH, *Circuit Judges.*

HASTINGS, *Chief Judge.* This is an appeal by plaintiff from an order of the district court entered October 12, 1960 dismissing this cause of action for failure of plaintiff's counsel to appear in court for a pre-trial conference scheduled for hearing on that date.

The order appealed from reads:

> "Pursuant to the inherent powers of the Court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause is now dismissed."

The history of this litigation is revealed by the record before us in this appeal.

On August 24, 1954, plaintiff William Link filed his complaint in the district court against defendant The Wabash Railroad Company to recover damages for injuries alleged to have been sustained by him when he drove an automobile into a collision with defendant's train standing across a highway in Indiana.

On September 17, 1954, defendant appeared and filed its answer to the complaint.

On September 17, 1954, defendant appeared and filed its answer to the complaint.

On April 30, 1955, defendant filed its motion for judgment on the pleadings. On October 18, 1955, hearing was had on this motion. On November 30, 1955, the district court granted defendant's motion for judgment on the pleadings and ordered the cause dismissed. From this order of dismissal plaintiff appealed. On October 10, 1956, our court reversed and remanded the case for trial. *Link* v. *Wabash Railroad Company*, 7 Cir., 237 F. 2d 1 (1956), cert. denied, 352 U.S. 1003 (February 25, 1957). On March 13, 1957, the mandate from this court was filed in the district court.

Subsequently, the trial court set the case for trial for July 17, 1957. On June 27, 1957, on motion of plaintiff and defendant not objecting, the trial date of July 17, 1957 was vacated; and the cause was continued.

On August 17, 1957, defendant filed interrogatories for plaintiff to answer.

On February 24, 1959, the trial court on its own initiative gave notice to the parties, pursuant to Local Rule 11,[1]

[1] Local Rule 11 of the United States District Court, Northern District of Indiana, effective September 1, 1955 (now Local Rule 10, effective March 1, 1960) reads:

"Dismissal of Civil Cases Because of Lack of Prosecution. Civil cases in which no action has been taken for a period of one year may be dismissed for want of prosecution with judgment for costs after thirty days notice given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise." See, *Darlington* v. *Studebaker-Packard Corporation*, 7 Cir., 261 F. 2d 903, 905 (1959), cert. denied, 359 U.S. 992.

that the cause would be dismissed on March 25, 1959, unless the court ordered otherwise.

On March 24, 1959, plaintiff filed answers to defendant's interrogatories.

On March 25, 1959, hearing was had on the show cause order, and on June 4, 1959 the trial court entered an order retaining the case on the docket and setting it for trial for July 22, 1959.

On July 2, 1959, on defendant's motion, to which plaintiff agreed, the trial date of July 22, 1959 was vacated; and the case was continued.

On March 11, 1960, defendant filed additional interrogatories for plaintiff to answer. On April 15, 1960, after an extension of time granted by the trial court, plaintiff filed answers to the additional interrogatories.

On September 29, 1960, pursuant to Local Rule 12, effective March 1, 1960, the district court caused notice to be mailed to counsel for both parties scheduling a pre-trial conference in this case to be held in court on October 12, 1960, at 1:00 o'clock p.m.

It is undisputed that counsel for both parties received this notice of the pre-trial conference. It is undisputed that Local Rule 12 was in force at the times in question and was adopted pursuant to an order of the district court.

Local Rule 12 provides:

> "The court may hold pre-trial conferences in any civil case upon notice given to counsel for all parties."

Pre-trial procedure is authorized by Rule 16, Federal Rules of Civil Procedure, 28 U.S.C.A. Local rule making power generally in the district court is derived from 28 U.S.C.A. § 2071. Rul 83, Federal Rules of Civil Procedure, provides:

> "• • • In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

On October 12, 1960, at 1:00 o'clock p.m., the time fixed for the pre-trial conference, the district judge called this case for pre-trial hearing. Defendant's counsel were present in court. Plaintiff's counsel did not appear. At 3:00 p.m., plaintiff's counsel not having appeared, the district court entered the foregoing order of dismissal.

The transcript of the proceedings had in court preceding the entry of the order of dismissal reveals the following factual situation which is not disputed by plaintiff.

The district judge's secretary was called into court and requested by the court to make a statement. She said that she mailed notice of the pre-trial conference to all counsel on September 29, 1960. She gave the following report to the court:

> "He [plaintiff's counsel] called about 10:45 [on Wednesday, October 12, 1960], and said he was in Indianapolis—that he was busy preparing papers to file with the [Indiana] Supreme Court. He said he wasn't actually engaged in argument and that he couldn't be here by 1:00 o'clock, but he would be here either Thursday afternoon or any time Friday if it could be reset.
>
> "At first he asked to talk to you, but you were on the bench, and he then asked if I could convey this to you.
>
> "I asked him if he had contacted Mr. Bodle [defendant's counsel], and he said he had yesterday, and he said he couldn't be there, and I don't know, of course, if he meant for the pretrial or for the deposition."

She stated that she told plaintiff's counsel she would convey this message to the court and opposing counsel. She also reported that this was the oldest civil case on the court docket. It further appeared that this was the first and only attempt counsel made to have the pre-trial conference continued.

Defendant's counsel stated to the district court at this time that plaintiff's counsel called him on the preceding morning (October 11, 1960) from Indianapolis and stated that he expected to be in court for the pre-trial but did not know whether he would attend the taking of a deposition of plaintiff set for the next day. He further stated counsel said "he was doing some work on some papers." He said that was the extent of his contact with him "since the time the Court sent out its notice of the pretrial," which he received on Sepember 30, 1960. He had a call from the secretary of the district judge reporting the message telephoned to her on the day of the hearing from Indianapolis by plaintiff's counsel.

The trial judge then reviewed the history of this litigation and pointed out that plaintiff's counsel had notice of the hearing, did not appear for the hearing and had failed to indicate any "reasonable reason" for not appearing. In view of all the circumstances surrounding counsel's action in the case, the trial court concluded that it should "exercise its inherent power to dismiss this action" upon "failure of plaintiff's counsel to appear at a pretrial • • • counsel having failed to give any good and sufficient reason for not appearing at the said pretrial." The case was then dismissed.

Plaintiff first contends that the dismissal was erroneous because nothing was scheduled for hearing on October 12, 1960 except the pre-trial conference and that this "had not been set by any *order* of the court but by a 'pre-trial notice'" sent to counsel. We think this contention is without merit. The "notice" was sent pursuant to Local Rule 12 of the district court. Local Rule 12 had been promulgated by an order of the court. Certainly a notice sent pursuant to an order of the court embodied in a court rule does and should have all the force and effect of an order of the court. Further, plaintiff has not cited any authority requiring that a pre-trial conference be scheduled by a specific court order to give it validity. It is well settled that court rules have the force of law. *Weil* v. *Neary*, 278 U.S. 160, 169 (1929).

Plaintiff argues that there was no motion by defendant for dismissal. Since the trial court did not base its dismissal on Local Rule 11, *supra*, or on Rule 41(b), Federal Rules of Civil Procedure, for want of prosecution, no such motion was required. It is quite clear to us that district courts have ample authority to "regulate their practice in any manner not inconsistent with" the Federal Rules of Civil Procedure, as provided in Rule 83, *supra*. This case comes within the purview of that rule.

Plaintiff maintains that Local Rule 12, *supra*, providing for pre-trial conferences, contains no sanctions calling for dismissal, or otherwise, and that in the absence of a provision for such sanctions the trial court erred. It is sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures and to impose appropriate sanctions for failure to comply. The authorities are all to the contrary.

In *Darlington* v. *Studebaker-Packard Corporation*, 7 Cir., 261 F.2d 903, 905 (1959), cert. denied, 359 U.S. 992, where we upheld the dismissal of a cause under another local rule (for want of prosecution), we said that "• • • it is within the court's inherent power to so dismiss an action without authority of statute or rule," citing *Hicks* v. *Bekins Moving & Storage Co.*, 9 Cir., 115 F. 2d 406, 408, 409 (1940). On the general inherent power of a court to dismiss an action as a sanction for disobedience of a court order, see Annotation, 4 A.L.R. 2d 348.

Courts may exercise their inherent powers and invoke dismissal as a sanction in situations involving disregard by parties of orders, rules or settings. *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & E. Co.*, 8 Cir., 245 F. 2d 613, 628 (1957), cert. denied, 355 U.S. 871; *Refior* v. *Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, 444 (1942), cert. denied, 316 U.S. 671. In the recent case of *Jameson* v. *DuComb*, 7 Cir., 275 F. 2d 293, 294 (1960), this court upheld a dismissal because of the failure of plaintiff to be present at the trial on the date previously set for the trial. The court there found no abuse of discretion on the part of the trial court. As the court pointed out in

Refior, supra, 124 F. 2d at 444, "Every litigant has the duty to comply with the reasonable orders of the court and, if such compliance is not forthcoming, the court has the power to apply the penalty of dismissal." See also, *Joseph* v. *Norton Company*, D.C.S.D.N.Y. 24 F.R.D. 72 (1959), affirmed, 2 Cir., 273 F. 2d 65 (1959).

The sanction of dismissal has been imposed for failure to comply with pre-trial settings. *Dalrymple* v. *Pittsburgh Consolidated Coal Company*, D.C.W.D.Penn., 24 F.R.D. 260 (1959); *Wisdom* v. *Texas Co.* D.C.N.D.Ala., 27 F. Supp. 922 (1939). In *Wisdom, supra*, plaintiff failed to appear at the pre-trial hearing; and the court dismissed the case, on motion of defendant, for failure to prosecute the action and for failure to comply with the Federal Rules of Civil Procedure, pursuant to Rule 41(b) of such rules. In 5 Moore's Federal Practice, p. 1038, note 15 (2d ed.), it is said that the dismissal in *Wisdom* "could also be regarded as a dismissal for failure to comply with an order of the court * * *." In *Dalrymple, supra*, 24 F.R.D. at page 262, the court noted that its local pre-trial rule was promulgated under Rules 16 and 83, Federal Rules of Civil Procedure, and said that the local rule "was designed to promote the expeditious processing of civil litigation * * *" "But unless appropriate sanctions are firmly imposed by the court for flagrant disobedience of its orders, the salutary purpose of [the local rule] will be entirely frustrated and the progress of litigation in this district hopelessly impeded."

Plaintiff argues that there was adequate showing of the inability of his counsel to be present at the pre-trial conference. We disagree. His brief refutes this contention wherein he states, "Plaintiff's counsel has *previously* become engaged in an important matter in the *Indiana Supreme Court*, not oral argument but preparing urgent papers of some kind, which required him to be in *Indianapolis*. As often happens in law work, the task took longer then expected, so that it occupied the day which had been set for this pre-trial conference * * *." With knowledge of the time and place of the pre-trial hearing, plaintiff's

counsel chose to complete his out-of-court work and called the district court and so advised it. In our opinion, this falls far short of being a legitimate excuse for failing to appear in court at the time fixed.

Plaintiff contends that the sanction of dismissal is unnecessarily harsh. In oral argument his counsel conceded that the district court might have disciplined him by imposing a lesser sanction. Many of the cases herein cited demonstrate that the character or degree of the sanction is within the discretion of the trial court. Under the circumstances of this case we find no abuse of discretion on the part of the trial court is dismissing the action.

Finally, in oral argument, plaintiff's counsel urged that his client should not be made to suffer a dismissal because of counsel's failure in this matter. The short answer to this is that the action or lack of action on the part of counsel is that of his client.

Pre-trial procedure has become an integrated part of the judicial process on the trial level. Courts must be free to use it and control and enforce its operation. Otherwise, the orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel. We do not believe such a course is within the contemplation of the law.

We find no error in the dismissal of this cause by the district court. The order of dismissal appealed from is affirmed.

AFFIRMED.

No. 13221

SCHNACKENBERG, *Circuit Judge*, dissenting.

I take as my text this 1952 pronouncement of the Supreme Court of New Jersey:

> "The *dismissal of a party's cause of action* is drastic punishment and should not be invoked except in those cases where the actions of the *party* show a

deliberate and contumacious disregard of the court's authority. * * * It seems to us that the plaintiff's conduct here did not warrant such severe punishment, particularly in view of the fact that the defendant would have suffered no loss by a further short adjournment which very well might have been granted on terms.

"* * * But courts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full untilzation of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of *as their paramount objective.* * * *"* (Italics supplied).

Allegro v. *Afton Village Corp.*, 87 A.2d 430, 432.

In this case there was an absence of the usual grounds for the involuntary dismissal of a suit. For instance there cannot be a serious contention that plaintiff's suit was vexatious or fictitious, 27 C.J.S. 403. We had already held in *Link* v. *Wabash R. R. Co.*, 237 F.2d 1, that his complaint stated a cause of action and we had remanded the case to the district court for trial. The United States Supreme Court denied *certiorari*, 352 U.S. 1003.

Defendant's counsel makes no effort to rely upon want of prosecution as a ground for the involuntary dismissal. Obviously defendant is in no position to make such a contention, inasmuch as it caused the district court to vacate the order setting the case for trial on July 22, 1959, and continue the case. Even if it had not done so, it is clear that its acquiescence in the delay would bar a dismissal of plaintiff's case for want of prosecution. 27 C.J.S. 445.

Therefore, there exists no basis for sustaining the dismissal order from which plaintiff has appealed, unless it is shown that there has been a disobedience by plaintiff of a court order. 27 C.J.S. 406. There is no such showing, because, first, there was no order commanding plaintiff

to do anything and hence no possibility of his being disobedient, and, secondly, there is no evidence that the plaintiff even had any knowledge of the proceedings which the trial court described as its exercise of "its inherent power to dismiss this action" upon "failure of plaintiff's counsel to appear at a pretrial * * *".

It is unnecessary to discuss the rationale of the holding that a pretrial conference was called in accordance with rules and that plaintiff's counsel did not appear. Certainly there is no suggestion that plaintiff was ever ordered or ever requested to appear at such a conference. His counsel was requested to do so and did not appear because, as he informed the judge's secretary, he was engaged in some activity in connection with business before the Indiana Supreme Court, at which time he requested a delay of a day or two for the conference. This message was conveyed to the trial judge. It further appears that plaintiff's counsel had informed defendant's counsel the preceding morning of his absence at Indianapolis.

On this showing the court dismissed plaintiff's case.

If one accedes to the proposition that plaintiff's counsel, despite his commitment at Indianapolis, should have been in attendance at the pretrial conference, and that his absence from the conference was inexcusable and made him amenable to discipline as an officer of the court, it is impossible to logically bridge the gap and to inflict disciplinary punishment upon his client rather than upon the attorney. The cause of action of the plaintiff for serious and permanent personal injuries and loss of earnings has been by the action of the court dismissed, not for any violation of any order by the plaintiff, but for an alleged dereliction by a lawyer who was held out to the plaintiff as one to whom he could entrust the handling of his case in the federal courts. It must be remembered that the attorney had been practicing for years in both the district court and this court of appeals.

The order now affirmed has inflicted a serious injury upon an injured man and his family, who are innocent of any wrongdoing. Plaintiff's cause of action, bearing the stamp of approval of this court, was his property. It has been destroyed.[1] The district court, to punish a lawyer, has confiscated another's property without process of law, which offends the constitution. A district court does not lack disciplinary authority over an attorney and there is no jusitfication, moral or legal, for its punishment of an innocent litigant for the personal conduct of his counsel. Because it was neither necessary nor proper to visit the sin of the lawyer upon his client, I would reverse.

[1] 28 U.S.C.A. Rule 41 (b).

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Friday, May 26, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

WILLIAM LINK,
Plaintiff-Appellant,

No. 13221 vs.

WABASH RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court entered therein on October 12, 1960, in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, June 21, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

WILLIAM LINE,
Plaintiff-Appellant,

No. 13221 vs.

WABASH RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

It Is Ordered by the Court that the appellant's petition for a rehearing of this cause be, and the same is hereby, DENIED.

(SCHNACKENBERG, *C.J.* voted to grant appellant's petition for rehearing)